

SERVED: January 19, 2001

NTSB Order No. EA-4878

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 18th day of January, 2001

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-16139
v.)	
)	
CARO MAITLAND,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge William R. Mullins rendered in this proceeding on December 21, 2000, at the conclusion of an evidentiary hearing.¹ By that decision the law judge affirmed an emergency order of the Administrator suspending the respondent's flight instructor certificate pending a successful reexamination of her qualifications to exercise the privileges conferred by the

¹An excerpt from the hearing transcript containing the initial decision is attached.

certificate.² For the reasons discussed below, we will deny the appeal.³

The Administrator's November 13, 2000 Emergency Order of Suspension, the complaint in this matter, alleges, among other things, the following facts and circumstances concerning the respondent:

1. You hold Airman Certificate No. 447707800 with Commercial Pilot privileges and Flight Instructor Certificate No. 447707800CFI.
2. On or about March 28, 2000, the Federal Aviation Administration (FAA) received a report of an examination concerning one of the students you had recommended for certification that indicated that the student had failed and was not prepared for the examination.
3. On or about June 6, 2000, the FAA received a report from a different examiner indicating that one of the students you had recommended for certification did not have the necessary endorsements in his pilot's log to qualify for the examination.
4. On or about June 29, 2000, the FAA received a report of an examination concerning the student described in paragraph 3 that indicated that the student had failed and was not prepared for the examination.
5. A review of FAA records indicated that only two of the six students you had recommended for examination from 1998 through August of 2000 passed on the first attempt.
6. In a letter dated August 28, 2000, you were notified that the facts described above gave reason to believe that a re-examination of your qualifications as a Flight Instructor was necessary as provided by 49 U.S.C. Section 44709.
7. You received the letter on or about September 4, 2000.

²Respondent's request that we review the Chief Law Judge's denial of her petition for review of the Administrator's determination that an emergency existed is dismissed. Our rules do not authorize an appeal of that decision. See Administrator v. Arizona Aviation Avionics, Inc., NTSB Order No. EA-4861 (2000).

³The Administrator has filed a reply opposing the appeal.

8. You replied through your attorney in letters dated September 8, and 27 asking several questions.

9. You declined the request for re-examination in a letter from your attorney dated October 3, 2000.

The law judge concluded in effect that the evidence introduced at the hearing provided a reasonable basis for the re-examination request. Nothing in respondent's brief supports reversing that decision.⁴ Indeed, essentially every argument pressed by respondent has been repeatedly and unequivocally rejected by numerous prior Board decisions involving re-examination requests by the Administrator, and the one difference between this case and the others, namely, the fact that the request here involves a flight instructor rather than a pilot, counsels less, not greater, scrutiny of a decision by the Administrator to satisfy herself that a specific certificate holder continues to possess the level of competence necessary in the interest of aviation safety.⁵

The following quotation from Administrator v. Hiraoka, NTSB Order No. EA-4486 (1996), is illustrative of our clear and consistent precedent in this area over the years:

⁴The law judge properly denied respondent's motion to dismiss the complaint for a nonprejudicial procedural error in its filing. See Administrator v. Eden, NTSB Order No. EA-4218 (1994).

⁵An instructor, after all, routinely makes judgments affecting the personal safety of others; for example, when a student is cleared to solo an aircraft for the first time. This uniquely important responsibility justifies a high level of attention to factors that could reveal either an erosion or absence of the ability to gauge a student's readiness to advance or a lack of proper care in making such judgments.

The Board has repeatedly explained that its authority to review the Administrator's exercise of discretion to re-examine a certificate holder is extremely limited. In a recent discussion of our jurisdiction in this area, Administrator v. Santos and Rodriguez, NTSB Order No. EA-4266 (1994) at 3-4, we stated:

Our precedent establishes that a Board determination as to the reasonableness of a re-examination request entails an exceptionally narrow inquiry. We do not attempt to secondguess the Administrator as to the actual necessity for another check of a certificate holder's competence. Rather, in a typical case, we look only to see whether the certificate holder has been involved in a matter, such as an aircraft accident or incident, in which a lack of competence could have been a factor and, if he was, we uphold the re-examination request as reasonable, without regard to the likelihood that a lack of competence had actually played a role in the event. See, e.g., Administrator v. Wang, NTSB Order EA-3264 (1991). In sum, the Administrator in such cases need only convince us that a basis for questioning competence has been implicated, not that a lack of competence has been demonstrated.

Just as a lack of pilot competence can be a factor in an aircraft incident or accident, a student pilot's failure on a flight test might be attributable to the deficient performance of his or her instructor. That nexus would, we think, be enough to justify a re-examination request of a flight instructor for even one failure of only one of his or her students because the student would not have been able to take the test without the instructor's written endorsement that he or she was ready (*i.e.*, prepared) to take and pass it. A failure therefore inevitably calls in question the validity of the sign off, or the adequacy of the instruction underlying it, notwithstanding the myriad other factors that either actually, or could have, caused or

contributed to the unsuccessful performance.⁶

The Administrator, of course, does not retest an instructor in the wake of any or every student's failure of a flight test, despite her apparent discretion to do so, and her re-examination request in this matter did not reflect such an automatic response. The record reflects that while the pass rate of respondent's students may not have been as low as the complaint asserted, it was, in the two-year plus timeframe identified in the complaint, only 57 percent, a rate considerably below the 80 percent standard an instructor using student success rates for obtaining renewal of an instructor certificate must demonstrate.⁷ The record also reflects that the pass rate for students instructed by respondent was declining and that the reports of two examiners who had failed two students (one twice) of respondent believed they were unprepared for the practical test in an unusually high number of areas of operation. This showing

⁶If, as respondent appears to argue, the Administrator needed to show that a specific flight test failure, or a high failure rate, was in fact caused by a loss or fall off in an instructor's proficiency or teaching skills, she would not have been given authority to re-examine airmen, "at any time" (see 49 U.S.C. § 44709). She would, instead, have been given only the authority to suspend or revoke their certificates after an investigation revealed the need to do so in the interest of safety.

⁷Under section 61.197(a)(1) of the Federal Aviation Regulations, a flight instructor can demonstrate qualification for a 24-month renewal of a flight instructor certificate by submitting "[a] record of training students showing that, during the preceding 24 calendar months, the flight instructor has endorsed at least five students for a practical test for a certificate or rating and at least 80 percent of those students passed that test on the first attempt."

amply supports the law judge's conclusion that the Administrator had an objectively reasonable basis for requesting a re-examination of respondent.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied⁸; and
2. The initial decision and the emergency order of suspension are affirmed.

HALL, Acting Chairman, HAMMERSCHMIDT, GOGLIA, BLACK, and CARMODY, Members of the Board, concurred in the above opinion and order.

⁸The request for oral argument is denied. The record contains adequate information for reaching a decision in this case.